

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ESTHER GOULD, et al., ) Case No. C04-02213 JPD  
)  
Plaintiffs, )  
) ORDER GRANTING PLAINTIFFS'  
v. ) MOTION TO ADD DEFENDANT,  
) DENYING DEFENDANT'S MOTION  
GORDON MOVING SERVICES, INC., ) TO DISMISS, AND DENYING  
Defendant. ) PLAINTIFFS' MOTION FOR  
)) SUMMARY JUDGMENT  
))

This matter comes before the Court upon plaintiffs' motion to add a defendant (Dkt. No. 14), plaintiffs' motion for summary judgment (Dkt. No. 15), and defendant's motion to dismiss (Dkt. No. 18). Having carefully reviewed the pleadings, supporting materials, and balance of the record, the Court ORDERS as follows:

(1) Plaintiffs' motion to add a defendant (Dkt. No. 14) is GRANTED. Plaintiff filed this action alleging that she sustained damages to her property due to the negligence of Gordon Moving Services, Inc. It appears from the evidence supplied by the defendant that Gordon Moving Services, Inc., was not incorporated until sometime after the move. Instead, Randy Gordon performed moving services as a sole proprietorship at the time of the move. Plaintiffs are seeking to add Randy Gordon as a defendant. Plaintiffs argue that failure to add Randy Gordon will prevent them from obtaining "complete relief" and that Mr. Gordon will not be prejudiced by

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01 being added. Defendant responds that plaintiffs' motion should have been brought under Fed. R.  
 02 Civ. P. 15 and that plaintiffs must now seek leave of the Court to amend their complaint in order  
 03 to add Mr. Gordon. (Dkt. No. 25).

04 The "principal function of [the Federal Rules of Civil Procedure] should be to serve as  
 05 useful guides to help, not hinder, persons who have a legal right to bring their problems before the  
 06 courts." *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986) (citations omitted). "[D]ecisions on the  
 07 merits are not to be avoided on the basis of mere technicalities." *Id.* Rather, the rules are to be  
 08 used to ensure a "just, speedy, and inexpensive determination of every action." Fed. R. Civ P. 1.

09 Under Fed. R. Civ. P. 15, after a responsive pleading has been served "a party may amend  
 10 the party's pleading [to add a party] only by leave of court or by written consent of the adverse  
 11 party." Fed. R. Civ. P. 15(a). Additionally, the court may add parties "at any stage of the action  
 12 and on such terms as are just." Fed. R. Civ. P. 21; *see, e.g. Pena v. McArthur*, 889 F. Supp. 403  
 13 (E.D. Cal. 1994) (indicating that the rule applies beyond the need to correct misjoinder of parties).

14 Here, plaintiffs have shown that the interests of justice and judicial economy favor adding  
 15 Mr. Gordon as a defendant. Plaintiffs' potential to recover for Mr. Gordon's alleged damage to  
 16 their property should not be foreclosed because of their failure to initially name him as a defendant,  
 17 nor for their chosen method of adding him. Moreover, the defendant Gordon Moving Services,  
 18 Inc., will not be prejudiced by the addition of Mr. Randy Gordon as a party. As a result, the Court  
 19 will treat the plaintiffs' motion to add a party as a motion to amend the complaint, and the  
 20 plaintiffs are directed to file an amended complaint, naming Mr. Gordon as a party, and to  
 21 properly serve him.

22 (2) Defendant's motion to dismiss (Dkt. No. 18) is DENIED. Defendant argues in its  
 23 motion to dismiss that plaintiffs' suit cannot succeed as a matter of law because it was not in  
 24 existence (e.g., had not been incorporated) at the time the alleged harms occurred. (Dkt. No. 18).  
 25 Further, defendant argues that it is entitled to summary judgment because plaintiffs have failed to  
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01 demonstrate an essential element of their case — the defendant’s legal existence. (Dkt. No. 18).  
 02 Plaintiffs respond that summary judgment should not be granted because the defendant may be  
 03 found liable under a theory of successor liability. (Dkt. No. 24).

04 A party may bring a motion to dismiss for “failure to state a claim upon which relief can  
 05 be granted.” Fed. R. Civ. P. 12(b)(6). If, however, such a motion relies upon “matters outside  
 06 the pleadings . . . the motion shall be treated as one for summary judgment and disposed of as  
 07 provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material  
 08 made pertinent to such a motion by Rule 56.” *Id.*

09 The Court construes defendant’s motion to dismiss as a motion for summary judgment  
 10 because it relies on information beyond the pleadings. Specifically, defendant’s motion relies on  
 11 the declaration of Randy Gordon to argue that the defendant corporation did not exist at the time  
 12 of the alleged harm. (Dkt. Nos. 18, 19).

13 A party is entitled to summary judgment “if the pleadings, depositions, answers to  
 14 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
 15 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter  
 16 of law.” Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, the  
 17 Court must view all evidence in the light most favorable to the nonmoving party and draw all  
 18 reasonable inferences in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50  
 19 (1986). An issue of material fact exists if the evidence is such that a reasonable jury could find for  
 20 the nonmoving party. *Id.* at 248.

21 Construing all of the evidence in a light most favorable to the plaintiffs, defendant has failed  
 22 to demonstrate at this stage that it is entitled to a judgment as a matter of law. Plaintiffs argue  
 23 that, even if defendant was not yet incorporated at the time the alleged harms occurred, defendant  
 24 could be held liable under a theory of successor liability. (Dkt. No. 24). Under Washington law  
 25 courts will impose successor liability when (1) a purchaser expressly or impliedly assumes a  
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01 predecessor's liabilities; (2) a purchase constitutes a de facto merger or consolidation; (3) the  
02 purchaser is a mere continuation of the seller; or (4) a transfer of assets is for the fraudulent  
03 purpose of escaping liability. *Martin v. Abbot Laboratories* 102 Wn. 2d 581, 609 (1984) (internal  
04 citations omitted). Thus, plaintiffs have articulated a legal theory by which defendant could be  
05 held liable, even if it wasn't incorporated at the time of the alleged harm.

06 Finally, plaintiffs have initiated discovery in this case. Although their response did not  
07 include a Rule 56(f) declaration, plaintiffs' response to the motion indicates that summary  
08 judgment at this stage is premature, particularly when an additional plaintiff will be added. The  
09 defendant's motion is DENIED without prejudice to renew the motion after discovery is  
10 completed.

11 (3) Plaintiff's motion for summary judgment (Dkt. No. 15) is DENIED. Plaintiffs  
12 argue that they are entitled to summary judgment because defendant damaged their property in  
13 violation of 49 U.S.C. § 14706(a), which imposes absolute liability for an actual loss or injury to  
14 property incurred in interstate commerce. They argue that they contracted with defendant to move  
15 their property from California to Washington, that defendant damaged their property during the  
16 move, and that defendant is therefore liable for the damage. Plaintiffs also argue defendant is liable  
17 under a theory of negligence.

18 Defendant responds that summary judgment cannot be granted against Randy Gordon  
19 because he has not yet been added as a defendant and that, if he has been properly added, the time  
20 period after which a motion for summary judgment may be brought has not yet elapsed. Defendant  
21 also argues that summary judgment is not appropriate here because it had not yet been  
22 incorporated at the time of the alleged harms and that the declaration of Joanne Gould and its  
23 supporting exhibits A through H, (Dkt. No. 16), upon which plaintiffs' motion relies, should be

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01 stricken because the declaration is based on inadmissible hearsay. (Dkt. No. 25).<sup>1</sup>

02 Construing the evidence in a light most favorable to defendant, plaintiffs' motion for  
03 summary judgment is denied. Plaintiffs have not demonstrated that the only current defendant to  
04 this action, Gordon Moving Services, Inc., was either incorporated at the time of the alleged harm,  
05 nor that defendant satisfies the elements necessary to establish liability under a theory of successor  
06 liability. Genuine issues of material fact exist as to the precise nature of defendant's relationship  
07 to Gordon Moving Services.

08 DATED this 25th day of May, 2005.

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JAMES P. DONOHUE

United States Magistrate Judge

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23 <sup>1</sup>In light of the Court's ruling on plaintiffs' motion for summary judgment (Dkt. No. 15),  
24 defendant's motion to strike (Dkt. No. 25) is denied. Plaintiffs are reminded, however, if they file  
25 a subsequent motion for summary judgment, their obligation to support any motion for  
summary judgment by admissible evidence. Fed. R. Civ. P. 56(c).

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